SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1216

CHARLES ADJMI,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the Opinion of the District Court of Appeal of Florida, Third District entered on April 9, 1968, and reported at 208 So.2d 859.

OPINIONS BELOW

Review is sought of the opinion of the District Court of Appeal of Florida, Third District, entered on April 9, 1968, and reported at 208 So.2d 859 (App. E). Petition for Rehearing was denied May 1, 1968 (App. F). Petition for Writ of Certiorari filed in the Supreme Court of Florida was denied on September 30, 1968 (App. G). The decision of the Supreme Court of Florida is reported at 218 So.2d

163. Petition for Rehearing was denied on October 31, 1968 (App. H). Motion to Stay Mandate was denied by the Supreme Court of Florida on November 13, 1968.

Application for Stay was denied by Mr. Justice Black on December 4, 1968, and Renewed Application for Stay was denied by him on December 28, 1968.

Application for Extension of Time in which to File Petition for Writ of Certiorari was granted by Mr. Justice Fortas extending the time for filing to and including March 30, 1969 (App. I).

The defendant was adjudicated guilty of larceny and sentenced by the Criminal Court of Record in and for Dade County, Florida, on October 6, 1966 to five years imprisonment.

Opinions of Florida courts rendered in proceedings prior to the second trial are reported at 139 So.2d 179 (App. B); 154 So.2d 812 (App. C); 170 So.2d 340 (App. D); 182 So.2d 242.

JURISDICTION

The decision of the District Court of Appeal of Florida, Third District, entered on April 9, 1968, became final upon denial of Petition for Rehearing on May 1, 1968, and determination by the Florida Courts became final upon denial of Petition for Rehearing by the Supreme Court of Florida on Oct 31, 1968.

Time for filing this Petition was extended to March 30, 1969 by Mr. Justice Fortas.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) because a title, right, privilege or immunity claimed under the Constitution of Statutes of the United States was denied by the District Court of Appeal of Florida, Third District. Jurisdiction is also invoked under Rule 19 (1) (a) of the Rules of the Supreme Court of the United States, adopted June 12, 1967, effective October 2, 1967, because a State Court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED

I.

WHEN CONVICTION IS REVERSED FOR A NEW TRIAL BASED UPON FAILURE OF THE PROSECUTION TO ELECT A SPECIFIC LARCENY CHARGE, MAY ADDITIONAL CHARGES BE FILED AS CONTINUATION AFTER THE STATUTE OF LIMITATIONS HAS RUN?

II.

MAY A DEFENDANT'S INCRIMINATING STATEMENTS BE USED AGAINST HIM AT TRIAL WHEN THEY ARE OBTAINED WITHOUT INFORMING HIM THAT HIS INTERROGATOR WAS IN THE EMPLOY OF THE PROSECUTOR, WHEN HE WAS NOT INFORMED OF HIS CONSTITUTIONAL RIGHTS, AND WHEN HIS COUNSEL WAS NOT PRESENT?

III.

IS THE STATE REQUIRED TO PRODUCE STATEMENTS MADE BY A WITNESS TO A PROSECUTOR IN PREPARATION FOR TRIAL, FOR USE IN IMPEACHMENT AND CROSS-EXAMINATION?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the witnesses against him; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28 UNITED STATES CODE-SECTION 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

RULES OF THE SUPREME COURT OF THE UNITED STATES RULE 19

(1)(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

FLORIDA STATUTE 811.021 (1)(a) (2) (5)

(1) A person who, with intent to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person:

(a) Takes from the possession of the true owner, or of any other person; or obtains from such person possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing; or obtains the signature of any person to a written instrument, the false making whereof would be punishable as forgery; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, goods and chattels, thing in action, evidence of debt, contract, or property, or article of value of any kind; or

(2) If the property stolen is of the value of one hundred dollars or more, the offender shall be deemed guilty of grand larceny, and upon conviction thereof shall be punished by imprisonment in the state penitentiary not exceeding 5 years, or in the county jail not exceeding 12 months, or by fine not exceeding $1,000.00.

(5) It shall be sufficient for any indictment, information or warrant returned, filed or issued under this section to charge generally that the defendant at the time and in the county specified, did steal the personal property, thing in

action, evidence of debt or contract or article of value out of which the prosecution arose, describing the same in general terms and alleging generally the ownership and value thereof. This section shall not be construed as intending to interfere with the power of the court to require the state to furnish the defendant with a bill of particulars in proper cases and on sufficient showing that cause exists for the same.

FLORIDA STATUTE 920.09

(1) When a new trial is granted such new trial shall proceed in all respects as if no former trial had been had, but where an offense is divided into degrees and the defendant has been convicted of a lesser degree, he cannot thereafter be prosecuted for a higher degree of the same offense.

FLORIDA STATUTE 932.05

Limitation of prosecutions. All offenses not punishable with death, save as hereinafter provided, shall be prosecuted within two years after the same shall have been committed. There shall be no limitation for offenses punishable with death where an indictment has been found or an information filed within two years after the commission of the offense and such indictment or information, because of any defect, omission or insufficiency in the contents or form thereof, is sub-

sequently quashed or set aside after said two year period has elapsed, in that event further indictments may be found or informations filed for such offense within three months after the entry of the order of the court quashing or setting aside the indictment or information, and prosecution thereunder shall proceed as if the same were commenced within two years after the commission of the offense.

STATEMENT OF THE CASE

On April 27, 1960, a single count information was filed in the Dade County Criminal Court of Record, Dade County, Florida charging Charles Adjmi and others with larceny of more than $100.00 from Genevra McAlister in checks, money and securities, between the dates of September 1, 1959 and March 5, 1960. At trial, the court admitted evidence relating to fourteen separate larcenies. Conviction resulted.

The District Court of Appeal of Florida, Third District, affirmed the conviction on the single impulse theory of larceny as a continuing offense. The opinion is reported at 139 So.2d 179 (App. B).

The Supreme Court of Florida quashed that decision and remanded the cause for a new trial, having repudiated the single impulse theory. The Court held that failure to require the State to elect a specific charge constituted reversible error. The opinion of the Supreme Court of Florida is reported at 154 So.2d 812 (App. C). Mandate issued accordingly.

On August 2, 1963, after the two year statute of limitations had run, the State filed ten additional single count informations against the defendants, each separately charging a crime of grand larceny, for which proof had been offered at the first trial. Each new information contained the allegation that it was a "continuation" of the charge of grand larceny set forth in the information of 1960. (App. A).

The defendants were arraigned on each of the new informations. On Motion to Quash, the trial court held that the initial 1960 information had been abandoned by the State filing the additional 1963 charges, and quashed the 1963 informations as barred by the statute of limitations.

Upon appeal by the State, the District Court of Appeal of Florida, Third District, reversed the trial court's ruling and remanded the cause for further proceedings. The opinion is reported at 170 So.2d 340 (App. D).

The Supreme Court of Florida granted certiorari, but on December 26, 1966, the Court discharged the writ it had previously issued. The decision is reported at 182 So.2d 242.

Upon remand, the trial court required the State to elect an information upon which to proceed to trial. The State elected the charge of larceny occurring on January 27, 1960 of checks totaling $119,995.92. That charge had been filed on August 2, 1963, but alleged it was a continuation of the original charge of grand larceny recited in the first single count information filed April 27, 1960.

Defendant waived trial by jury. His trial commenced on September 13, 1966.

At trial, John R. Walsh, a witness for the State, testified about conversations between the defendant and himself shortly before the trial. At that time defendant's counsel was not present. The witness did not caution the defendant that the statements he gave would be used against him at his trial or that he had the right to consult with his attorney, or that he could remain silent. Mr. Walsh did not disclose to Charles Adjmi that he was in the employ of the prosecutor. The incriminating statements he obtained from the defendant concerned discussions of restitution.

The appellate court upheld the admission of the testimony.

Mrs. McAlister, victim of the alleged larcenies and witness for the prosecution, admitted at trial that she had made statements to members of the staff of the State Attorney prior to the filing of the first information. Upon motion, the trial court examined the statements pertaining only to January 27, 1960, in camera, and submitted portions to the defense. The statements were sealed and preserved for review. The defense had requested all prior statements made by the witness for use in cross-examination and impeachment of statements made by her at the first trial and read at the second trial.

The appellate court upheld the court's refusal to furnish counsel the prior statements.

The trial court adjudicated Charles Adjmi guilty, and sentenced him to serve five years in the State Penitentiary. $25,000.00 bond was set.

The District Court of Appeal of Florida, Third District, affirmed the conviction. The opinion is reported at 208 So.2d 859 (App. E). Petition for Rehearing was denied (App. F).

Petition for Writ of Certiorari filed in the Supreme Court of Florida was denied (App. G). Petition for Rehearing was denied on October 31, 1968 (App. H).

HOW THE FEDERAL QUESTIONS WERE RAISED

I. Amended informations

The first federal question concerning denial of due process, and equal protection of law, fair trial, and double jeopardy was raised at every stage of the proceedings. Motion to Compel Election was made at the original trial as soon as it became apparent that evidence of more than one transaction would be offered. The Motions were denied by the trial court, and the decision was affirmed on appeal. It was then reversed by the Supreme Court of Florida which repudiated the single impulse theory on the ground that defendant was denied a fair trial by the inclusion of fourteen charges in a single information, and it was impossible to determine upon which evidence the jury verdict rested. The Court observed in its opinion that a fair trial was essential even for those defendants against whom the evidence was great.

Motion to Quash the additional informations was granted upon remand, the trial court holding in its Amended Order that the initial information was abandoned and that the new informations were barred by the statute of limitations.

The State appealed from that Order and the District Court of Appeal reversed on the ground that the new charges contained statements linking them with the first information, and held that both the old and the new charges remained standing. The court rejected the argument concerning double jeopardy.

The question was again raised on Petition for Writ of Certiorari, which the court dismissed.

The federal question was raised at the second trial (Transcript of Testimony pages 12 through 14). The federal question was decided adversely to defendant on appeal, and was again raised in Petition for Writ of Certiorari, which was denied.

II. Obtaining incriminating statements by subterfuge

The second federal question concerning post-indictment incriminating statements obtained by subterfuge so as to deny defendant his right of effective counsel and protection against self-incrimination was raised at trial, by Motion to Strike the testimony of witness Walsh. The Motion was denied. (Transcript of Testimony p. 310). The question was raised on appeal, the appellate court deciding that **Massiah v. United States**, 377 U.S. 201, 84 S.Ct. 1199 was inapplicable where defendant sought out the witness. The question was renewed in Petition for Writ of Certiorari in the Supreme Court of Florida, which was denied.

III. Production of prior statements for cross-examination and impeachment.

The third federal question concerning requested statements taken by the State Attorney of Mrs. McAlister for use in impeachment and cross-examination was raised at the trial (transcript of testimony pages 246-252) by Motion for Statements, which was denied. On appeal defendant relied upon **Jencks v. United States**, 353 U.S. 657, 77 S. Ct. 1007. The appellate court held that Florida courts maintain that a defendant in a criminal case is not entitled to inspect statements of a prosecution witness which were taken by a prosecuting officer in preparation for trial, whether or not such statements are sought for the purpose of cross-examination or impeachment. The trial court had examined the statements in camera, and had sealed them for inclusion in the record on appeal. The appellate court did not reexamine the statements, but reached its decision without regard to their content.

The question was renewed in Petition for Writ of Certiorari which was denied.

REASONS FOR GRANTING THE WRIT

I. The amended informations

Charles Adjmi's grand larceny conviction was reversed and a new trial granted because the prosecution had not been required to elect a specific instance of grand larceny as the subject of his first trial. Instead, his original trial had proceeded upon an information numerous alleged instances of grand larceny, so that it was impossible to determine upon which allegation the jury had convicted him.

By the time the second trial was held, the state had been permitted to rely upon the original information as valid, and to add each of the several larcenies as an amendment to the information because in continuation of it, although the statute of limitations had run.

Charles Adjmi was then convicted upon an information filed after the expiration of the statute of limitations. He was thereby deprived of due process of law, equal protection of law, and of a fair trial. His rights under the Fourteenth Amendment of the Constitution of the United States were denied him. In addition, he was placed in renewed jeopardy in violation of due process requirements of the Fourteenth Amendment and of the Fifth Amendment applicable to the states through the Fourteenth Amendment.

The Florida District Court of Appeal, Third District, reasoned that each new information filed on August 2, 1963 charged one of the larcenies encompassed by the initial information for which proof had been offered at the first trial. (App. F: 208 So2d 859, referring to 170 So.2d 340). The Court found that the initial information was not abandoned, and that the new charges were not barred by the statute of limitations.

Although Florida Statute 932.05 permits a new trial after a reversal when the statute of limitations has run when an information is quashed for insufficiency in its contents, the appellate court's decision removed this case from the application of that statute. No justification for amending after the expiration of the statute of limitations existed.

As a consequence of the court's decision upholding the validity of the first information, Charles Adjmi was placed in renewed jeopardy at his second trial upon the same information, newly amended. Although the state did finally elect a specific larceny charge as the basis for the second trial, that charge had previously been before the jury at his first trial.

In **Bartkus v. Illinois**, 359 U.S. 121, 3 L ed 2d 684, 79 S.Ct. 676, Mr. Justice Black in his dissenting opinion stated:[1]

> "For I think double prosecutions for the same offense are so contrary to the spirit of our free country that they violate even the prevailing view of the Fourteenth Amendment, expressed in Palko v. Connecticut, 302 U.S. 319, 82 L ed 288, 58 S.Ct. 149."

The **Palko** decision referred to fundamental principles of liberty and justice.

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[1]Mr. Justice Black also stated at page 151:

"Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times. Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers. By the thirteenth century it seems to have been firmly established in England, where it came to be considered as a 'universal maxim of the common law'. It is not surprising, therefore, that the principle was brought to this country by the earliest settlers as part of their heritage of freedom, and that it has been recognized here as fundamental again and again . . . While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act, and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them in two trials, the basic and recurring theme has always simply been that it is wrong for a man to 'be brought into Danger for the same offense more than once'. Few principles have been more deeply 'rooted in the traditions and conscience of our people". (footnotes omitted).

In the dissenting opinion of Mr. Justice Fortas, with whom the Chief Justice and Mr. Justice Douglas joined in **Cichos v. Indiana,** 385 U.S. 36, 17 L ed 2d 175, 87 S.Ct. 271, the question of acquittal or denial at a first trial was thought not to be a valid distinction against a double jeopardy argument.

The fundamental unfairness of repeated attempts by the State to convict Charles Adjmi without regard to his constitutional protections, is apparent from the testimony at the second trial, where it is clear that witnesses were aware of the purpose to comply with the appellate court's decision. Their testimony was tailored to convict this defendant of a particular act on a particular date, and their thinking was aligned with that purpose, perhaps unintentionally.

The circumstances in the case at bar bring it within the exceptions named in **Hoag v. New Jersey,** 356 U.S. 464, 2 L ed 2d 913, 78 S.Ct. 829; **Palko v. Connecticut,** supra; and **Brock v. North Carolina,** 344 U.S. 424, 97 L ed 456, 73 S.Ct. 349.

Equal protection of law should not be withheld merely as the Court deems a defendant guilty or innocent. **Hill v. Texas,** 316 U.S. 400, 86 L ed 1559, 62 S.Ct. 1159. If justice is administered by haphazard methods, law becomes useless as a system and descends to a tool for the affirmation of preconceived notions of guilt.

Denial of equal protection here stems from renewed jeopardy imposed upon the defendant by a second trial upon a charge previously tried.

Florida Statute 932.05 permits further informations to be filed after the statute of limitations has run where the original information is quashed or set aside "because of any defect, omission or insufficiency in the contents or form thereof". Since the appellate court found the information sufficient for at least one larceny, it answered the statute of limitations problem by permitting the new informations to be "in continuation" of the original charge. That result is directly contrary to the purpose and provisions of the statute of limitations, particularly in view of the court's statement (footnote 5 in its opinion) recognizing that Florida Statute 932.05 was not authority for its decision. Defendant was thereby denied equal protection of law.

Denial of equal protection of law results from failure to apply the statute of limitations.

II. OBTAINING INCRIMINATING STATEMENTS BY SUBTERFUGE

When the Court permitted the use of incriminating statements against the defendant, although they had been obtained after the filing the information, and without his knowledge that his interrogator was in the employ of the prosecutor, or that counsel could assist him, it denied constitutional rights.

Charles Adjmi was denied his constitutional protection against self-incrimination under the Fifth Amendment, applicable to the States through the Fourteenth Amendment. **Malloy v. Hogan,** 378 U.S. 1, 12 L ed 2d 653, 84 S.Ct. 1489.

He was deprived of his right to counsel under the Sixth Amendment applicable to the States through the Fourteenth Amendment. **Gideon v. Wainwright,** 372 U.S. 335, 9 L ed 2d 799, 83 S. Ct. 792.

Right to counsel is fundamental to a fair trial and obligatory on the States. **Escobedo v. Illinois,** 378 U.S. 478, 12 L ed 2d 977, 84 S.Ct. 1758.

Statements obtained from custodial interrogation require warnings of the right to an attorney and their possible use in evidence in the absence of a clear, intelligent waiver. **Miranda v. Arizona,** 384 U.S. 436, 16 L ed 2d 694, 86 S.Ct. 1602.

The right to effective counsel precludes secret interrogation of the defendant which contravenes fundamental rights. **Spano v. New York,** 360 U.S. 315, 3 L ed 2d 1265, 79 S.Ct. 1202; **Massiah v. United States,** 377 U.S. 201, 12 L ed 2d 246, 84 S.Ct. 1199.

Massiah is applicable and binding on the states. **McLeod v. Ohio,** 381 U.S. 356.

In **Burgett v. Texas,** __U.S.__, 19 L.ed 2d 319, 88 S.Ct. __ (1967), this Court stated that although it does not sit as a court of criminal appeals to review state cases, and states are free to provide their procedures, those procedures must not infringe Federal Constitutional guarantees. Those limitations sometimes touch rules of evidence.

Recently, in **Mathis v. United States,** ____ U.S. ____, 20 L ed 2d 381, 88 S.Ct.____, this Court held that the use of oral statements obtained from a defendant while he

was in jail serving another sentence, without warnings that the evidence obtained could be used against him, and that he had a right to remain silent, required reversal. The court affirmed its decision in Miranda, supra, and refused to narrow its scope to questioning by an interrogator concerning the case under investigation while Defendant is in custody for that offense.

III. PRODUCTION OF PRIOR STATEMENTS FOR CROSS-EXAMINATION AND IMPEACHMENT

Deliberate concealment or suppression of material evidence by the State impairs the constitutional rights of an accused.

The question presented by the court's refusal to furnish for impeachment and cross-examination statements made by a witness to the prosecution in preparation for trial, concerns principles enunciated in **Brady v. Maryland,** 373 U.S. 83, 10 L ed 2d 215, 83 S.Ct. 1194. The question is presented under circumstances of **Jencks v. United States,** 353 U.S. 657, 1 L ed 2d 1103, 77 S.Ct. 1007 and of 18 U.S.C. 3500.

Suppression by the prosecution of requested evidence favorable to an accused violates due process of law where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution, **Brady v. Maryland,** supra.

Refusal to afford defendant statements of Mrs. McAlister requested for impeachment and cross-examination, resulted in violation of Sixth Amendment rights of con-

frontation, obligatory on the States through the Fourteenth Amendment. **Pointer v. Texas,** 380 U.S. 400, 15 L ed 2d 923, 85 S.Ct. 1065; **Douglas v. Alabama,** 380 U.S. 415, 13 L ed 2d 934, 85 S.Ct. 1074.

The right of cross-examination is contained in the right of confrontation. **In re Oliver,** 333 U.S. 257, 92 L ed 682, 68 S.Ct. 499; **Turner v. Louisiana,** 379 U.S. 466, 13 L ed 2d 424, 85 S.Ct. 546.

In Florida, a defendant is entitled to inspect for cross-examination purposes a transcript of statements of prosecution witnesses taken by the prosecution before a magistrate. **Jackman v. State,** 140 So.2d 627 (Fla. App. 1962). No valid distinction exists to preclude such use at trial.

Although the **Jencks** principle was redirected under the **Jencks Act,** 18 U.S.C. 3500 (1965), its rationale was compelled under the Sixth Amendment.[2] An accused should not be denied the opportunity to bring every relevant piece of evidence on the question of guilt or innocence to his defense.

Advances in achieving truth and justice brought about by this Court's decision in **Brady v. Maryland,** supra, and in the **Jencks** case, should not be abandoned.

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[2]Vol. 55 American Bar Association Journal, page 152, Semerjian, The Right of Confrontation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District, should be granted, and the decision of that Court reversed.

Respectfully submitted,

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By _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was mailed to HON. EARL FAIRCLOTH, Attorney General, 1350 N.W. 12th Avenue, Miami, Florida and HON. EARL FAIRCLOTH, Attorney General, The Capitol, Tallahassee, Florida, this ____ day of March, 1969.

_____